

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Inquiry Concerning the Deployment of)	
Advanced Telecommunications)	GN Docket No. 04-54
Capability to All Americans in a Reasonable)	
and Timely Fashion, and Possible Steps)	
to Accelerate Such Deployment)	
Pursuant to Section 706 of the)	
Telecommunications Act of 1996)	

COMMENTS OF SBC COMMUNICATIONS INC.

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I. INTRODUCTION AND SUMMARY

SBC Communications, Inc. (SBC) submits the following comments in response to the Commission's fourth inquiry concerning the deployment of broadband to all Americans pursuant to section 706 of the Telecommunications Act of 1996.¹ While much about broadband has changed since the Commission began its first inquiry back in 1998, three things have stayed remarkably constant. First, cable companies still dominate the overall market for broadband services in the U.S. Second, incumbent telephone companies remain the most heavily regulated broadband providers despite their second-place status in the market. And third, there is still a great deal of uncertainty as to how broadband services will be regulated.

Thus, as the Commission begins its fourth inquiry on broadband deployment, the Commission's primary objective must be to level the competitive playing field and create a stable regulatory environment for all broadband providers. The surest way to accomplish this goal is for the Commission to fully and finally resolve each of the three wireline proceedings it identified more than two years ago in its *Third 706 Report* as being central to its broadband regulatory framework:² (1) the *Wireline Broadband NPRM*;³ (2) the *Non-Dominance*

¹ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 04-54, Notice of Inquiry, FCC 04-55 (released March 17, 2004) (*Fourth 706 Inquiry*). In these comments, SBC uses the term "broadband" to refer collectively to both "high-speed services" and "advanced services" as the Commission defines those terms, unless otherwise specified. In addition, because the Commission has traditionally focused on residential and small business customers in its section 706 inquiries, SBC's comments are directed primarily to addressing issues that affect those market segments, unless otherwise noted.

² *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Report, 17 FCC Rcd 2844 (2002) (*Third 706 Report*).

³ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002) (*Wireline Broadband NPRM*).

NPRM;⁴ and (3) the *Triennial Review NPRM*;⁵ Unfortunately, the first two proceedings have been dormant since early 2002. And while the Commission should be commended for the substantial progress it has made on the third proceeding, there are still many open questions in that proceeding which must be resolved.⁶

The inequities and regulatory uncertainty created by these incomplete proceedings are inhibiting efficient investment in broadband networks and services and skewing competition in the broadband marketplace.⁷ Burdened by an asymmetrical regulatory landscape and continuing uncertainty, telephone companies simply cannot afford to make the substantial investment necessary to fully deploy these networks and services. Thus, to fulfill its obligation under section 706 to encourage broadband deployment by “remov[ing] barriers to infrastructure investment,” the Commission must complete its pending broadband proceedings expeditiously

⁴ *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, 16 FCC Rcd 22745 (2001) (*Non-Dominance NPRM*)

⁵ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Notice of Proposed Rulemaking, 16 FCC Rcd 22781 (2001) (*Triennial Review NPRM*).

⁶ *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Report and Order and on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) (*Triennial Review Order*).

⁷ *See, e.g., The Effects of Ubiquitous Broadband Adoption on Investment, Jobs and the U.S. Economy*, Criterion Economics, LLC, (Sept. 2003) (“[T]he FCC has not yet addressed fundamental broadband deregulation issues, which are presented in pending rulemaking proceedings.”); *Directions for the Next New Age of Telecom Regulation*, New Millennium Research Council (Jan. 2004) (“Current regulatory paradigms are facilitating the industry’s economic stagnation and curtailing investment in the nation’s broadband infrastructure.”).

and provide the competitive balance and regulatory certainty needed to incent efficient broadband investment.⁸

II. DISCUSSION

A. The Commission Has a Congressionally-Mandated Obligation to Take Affirmative Steps to Encourage Broadband Deployment.

In section 706 of the 1996 Act, Congress mandated that the Commission “*shall* encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans” through a variety of regulatory tools “that remove barriers to infrastructure investment.”⁹ If the Commission finds that broadband deployment is lagging, Congress required that the Commission “*shall take immediate action* to accelerate deployment of [broadband] by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”¹⁰

By emphasizing the need to remove barriers to infrastructure investment, Congress clearly recognized that deploying broadband networks is a highly capital-intensive and time-consuming endeavor. Indeed, the urgency in Congress’s directive for Commission action reflects a keen understanding that broadband providers must have a stable regulatory environment that encourages investment before they can be expected to spend the billions of dollars necessary to build-out broadband networks across the nation -- especially the fiber-based networks that will deliver the next generation of broadband services. Thus, given the time and

⁸ See Section 706(a) of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996), reproduced in the notes under 47 U.S.C. § 157.

⁹ § 706(a) of the 1996 Act.

¹⁰ § 706(b) of the 1996 Act. See also 47 U.S.C. § 230(b)(2) (codifying the “policy of the United States to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”).

expense required to deploy broadband, Congress was adamant that the Commission “shall” create such a regulatory environment.

In a speech just last month, President Bush echoed the Congressional directives of section 706 when he stated that the proper role for government in supporting broadband deployment “is to clear regulatory hurdles so those who are going to make investments do so.”¹¹ The President emphasized that a key to broadband deployment will be developing government policy that “encourages people to invest, not discourages investment.” He urged the Commission to continue “clearing out the underbrush of regulation” and “to eliminate burdensome regulations on new broadband networks.”

The Commission itself has stated “that the further deployment of advanced services is one of the Commission’s highest priorities.”¹² The Commission has emphasized “that substantial investment is required to build out the networks that will support future broadband capabilities and applications.”¹³ Accordingly, the Commission has recognized the need to develop a “policy and regulatory framework [that] will work to foster investment and innovation in these networks by limiting regulatory uncertainty and unnecessary or unduly burdensome regulatory costs.”¹⁴

As the Commission embarks on what is now its fourth inquiry under section 706, the Commission should rededicate itself to complying with Congress’s clear mandate for aggressive

¹¹ *Remarks by the President at the American Association of Community Colleges Annual Convention, Minneapolis, Minnesota (April 26, 2004).*

¹² *Third 706 Report* ¶ 6.

¹³ *Wireline Broadband NPRM* ¶ 5.

¹⁴ *Wireline Broadband NPRM* ¶ 5.

action to encourage broadband investment. As discussed below, that action must include the full and expeditious resolution of several key broadband proceedings that have been pending before the Commission for more than two years. If the Commission fails to take decisive action, it risks turning its section 706 inquiries into a mere academic exercise in reporting broadband factoids and cataloging the Commission's pre-existing and incomplete broadband initiatives. Worse still, further Commission delay leaves intact barriers to investment and impedes the build out of broadband networks and services to American consumers and businesses. As Chairman Powell bluntly stated about the Commission's broadband proceedings: "It is now time for fewer words and more action."¹⁵

B. The Commission Should Not Abandon the Definitions of High-Speed Service and Advanced Service in Use Today.

In the *Fourth 706 Inquiry*, the Commission seeks comment on whether it should increase the speeds that a service must offer to qualify as a "high-speed service" (currently more than 200 kilobits per second (Kbps) in at least one direction) or an "advanced service" (currently more than 200 Kbps in both directions).¹⁶ The Commission asks whether consumer expectations about bandwidth have changed over time in such a way that would warrant increasing the speeds used in its definitions. The Commission also asks whether there are other attributes, besides speed, that may be relevant to the definition of broadband.

Before addressing these questions, however, the Commission must first consider the purposes for which it is soliciting this information: to "determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely

¹⁵ *Wireline Broadband NPRM*, Separate Statement of Chairman Michael K. Powell at 1.

¹⁶ *Fourth 706 Inquiry* ¶ 11.

fashion.”¹⁷ In section 706, Congress defined “advanced telecommunications capability” as “high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.”¹⁸ Noticeably absent from this definition is any specific speed, or any requirement directing the FCC to choose a specific speed to be used in the definition.

Moreover, as the Commission appears to recognize, transmission speed is but one part of the broadband experience. “Enabl[ing] users to originate and receive high-quality voice, data, graphics, and video telecommunications,”¹⁹ is a function not only of transmission speed, but also other factors, such as the type of application the user is running, the customer premises equipment involved in the communication, and the use of compression technologies to reduce the size of the data files to be transmitted, among other things. While many of these factors may be difficult to quantify for the Commission’s data gathering purposes (and we do not suggest the Commission attempt to do so), the Commission should at least be cognizant that factors other than pure transmission speed may affect whether a consumer is able to effectively engage in broadband communications.

Thus, in determining what speeds to use in defining “high-speed services,” “advanced services,” and any other classification(s) the Commission chooses to employ, the Commission should be guided first and foremost by the choices that consumers are making in the marketplace when they purchase an Internet access service. Indeed, consumers, rather than the Commission, are in the best position to gauge the value proposition of the different offerings available today,

¹⁷ § 706(b) of the 1996 Act.

¹⁸ § 706(c)(1) of the 1996 Act.

¹⁹ § 706(c)(1) of the 1996 Act.

considering not just speed, but pricing, reliability, and other factors. And in today's broadband marketplace, the majority of home Internet users (69.6 million individuals or 62 percent of home Internet users) still rely on *narrowband* Internet access.²⁰ Additionally, a substantial number of subscribers have chosen broadband service with minimum speeds not far above 200 Kbps. For example, although SBC offers a wide array of digital subscriber line (DSL) services with varying speeds and features,²¹ the vast majority of SBC's DSL subscribers have chosen SBC's lower-priced, entry-level ADSL product, which has a downstream speed between 384 Kbps and 1.5 Mbps and an upstream speed of 128 Kbps. Thus, it may be premature for the Commission to consider abandoning the 200 Kbps standards, especially given the large number of Internet users that have not yet made the leap to an entry-level broadband service, let alone one of the higher-speed services currently available.²²

Nonetheless, to fulfill its duties under section 706, the Commission has a legitimate interest in monitoring the development of broadband service offerings and the overall migration patterns of Internet users as they move from dial-up service, to entry-level broadband services, and then on to more advanced services. As the Commission appears to have recognized in its *Broadband Data Gathering NPRM*, a potential way of accomplishing this task may be a multi-tiered approach to categorizing broadband speeds that captures the offerings available in the

²⁰ See *Fifty Million Internet Users Connect Via Broadband, Rising 27 Percent During the Last Six Months, According to Nielsen//NetRatings*, Press Release, Nielsen//NetRatings (Jan. 8, 2004) (estimating 69.6 million users of narrowband Internet access in the U.S. as of November 2003).

²¹ SBC offers ADSL with downstream speeds ranging from 384 Kbps up to 6Mbps and upstream speeds ranging from 128 Kbps up to 384 Kbps. SBC also offers symmetric DSL with downstream and upstream speeds of 384 Kbps.

²² Changing the current 200 Kbps standards would also distort the Commission's reporting of long term trends in broadband usage by altering the baseline of the Commission's existing time-series data, for which the Commission has already obtained nine separate semi-annual data points since it began collecting this information in 1999.

market today, as well as those expected in the near future.²³ The Commission will need to strike an appropriate balance, however, between gathering additional information and imposing undue administrative burdens on broadband providers through its data reporting requirements. SBC looks forward to working with the Commission to address its proposals for revising its broadband data collection program and we will provide more detailed comments in that proceeding.

C. Although the Broadband Marketplace Today is Competitive, Cable Companies Still Dominate Telephone Companies in the Race for Broadband Subscribers.

When the Commission first reported on the state of broadband deployment in 1999, there were only about 1.8 million residential and small business high-speed lines in service in the United States.²⁴ With control over 1.4 million of those lines, the cable industry had already firmly cemented its position as the dominant provider of broadband service. ADSL service, provided by telephone companies, was a distant runner-up with only about 300,000 lines. Other high-speed services, including fiber, satellite and fixed wireless, accounted for less than 100,000 lines.

Not surprisingly, there was only limited competition at this early stage of broadband deployment. According to Commission data, only about 34 percent of zip codes were served by two or more providers of high-speed service in December 1999, and 40 percent of U.S. zip codes

²³ *Local Telephone and Broadband Competition Reporting*, WC Docket No. 04-141, Notice of Proposed Rulemaking and Order on Reconsideration, FCC 04-81 at Appendix B (released April 16, 2004) (*Broadband Data Gathering NPRM*) (retaining the 200 Kbps standard, but adding additional categories of broadband service).

²⁴ *High-Speed Services for Internet Access: Status as of June 30, 2003*, Wireline Competition Bureau, FCC, at Table 3 (Dec. 2003) (*FCC December 2003 Broadband Data Report*).

had no high-speed lines in service at all.²⁵ Of those zip codes with two or more providers, most were located in or around the nation's major population centers.²⁶

In many respects, the broadband marketplace today is vastly different than the one the Commission first glimpsed in 1999. The Commission's data show that, as of June 2003, there were more than 20.6 million high-speed lines serving residential and small business customers in the U.S. -- a nearly 1,200 percent increase since December 1999.²⁷ By the end of 2003, the Leichtman Research Group estimates that there were more than 24.6 million high-speed subscribers in the U.S.,²⁸ accounting for roughly 20 percent of U.S. households. And Strategy Analytics predicts that there will be 33.5 million homes with high-speed service by the end of 2004.²⁹

According to the Commission's most recent data, there are now high-speed lines serving 91 percent of the nation's zip codes.³⁰ In a recent survey by the Pew Internet and American Life Project, 77 percent of Americans said they live in an area where broadband is available (8 percent said they did not live in an area where broadband is available and 15 percent said they

²⁵ *FCC December 2003 Broadband Data Report* at Table 12.

²⁶ SBC recognizes the limitations of the current zip code data for gauging the level of competition in broadband services in a specific geographic area. *See Broadband Data Gathering NPRM* ¶ 9. But at the aggregate national level, the data can provide a useful view of competitive entry.

²⁷ *FCC December 2003 Broadband Data Report* at Table 3.

²⁸ *Broadband Internet Grows to 25 Million in the U.S.*, Press Release, Leichtman Research Group (March 8, 2004) (*Leichtman Report*).

²⁹ *Strategy Analytics: 8.5 Million US Homes to Add Broadband in 2004*, Press Release, Strategy Analytics (April 28, 2004).

³⁰ *FCC December 2003 Broadband Data Report* at Table 12.

did not know).³¹ And the Commission's data show that two or more broadband providers have high-speed lines in service in about 75 percent of the country's zip codes, and three or more broadband providers are offering high-speed service in 58 percent of zip codes.³²

Moreover, the broadband marketplace is no longer just a two-horse race between cable modem service and DSL. Satellite providers, licensed wireless providers offering both fixed and mobile services, providers of unlicensed wireless services (such as Wi-Fi), and broadband over powerline (BPL) companies are all offering broadband services that compete for consumer dollars.³³ Thus, while broadband is by no means ubiquitous and the Commission still has plenty of work ahead of it, the seeds of broadband competition have firmly taken root in the marketplace and are rapidly beginning to grow.

Despite these important changes, one thing has remained constant since 1999: cable companies are still the dominant providers of broadband service in the U.S. Notwithstanding the emergence of broadband competition, Commission data show that cable still has a more than two-to-one advantage over ADSL in "high-speed" lines (at least 200 Kbps in one direction): 13.6 million cable modem lines compared to 6.4 million ADSL lines, as of June 2003.³⁴ And cable's dominance in the market for "advanced services" (at least 200 kbps in both directions) is

³¹ *Pew Internet Project Data Memo*, Pew Internet & American Life Project (April 2004).

³² *FCC December 2003 Broadband Data Report* at Table 12.

³³ See, e.g., *Reaching Critical Mass: The US Broadband Market*, In-Stat MDR (March 2004); *Welcome to the Wi-Fi Revolution*, CNN (Sept. 8, 2003); *PowerPlay*, Time Magazine (May 3, 2004); *The Next Information Age*, CNN (Oct. 15, 2003); *Broadband Over Power Lines: Finally...After All Those Years*, Thomas Weisel Partners (May 3, 2004).

³⁴ *FCC December 2003 Broadband Data Report* at Table 3.

far more striking -- an almost six-to-one advantage: 11.9 million cable modem lines compared to 2.1 million ADSL lines.³⁵

While ADSL providers like SBC have made important strides to close the gap with their cable competitors in recent months,³⁶ the cable industry still dominates the overall broadband marketplace. Indeed, according to press reports, Comcast, which is the nation's largest broadband provider with 5.7 million subscribers, recently told analysts "it was still winning a majority of residential customers in its markets, and that it saw no need for a lower-priced, lower-speed service."³⁷ And as one market analyst recently stated:

Clearly the market for broadband has become more competitive in the past year, and competition will only intensify as the number of broadband subscribers in the US doubles over the next four years Yet it is premature to proclaim that DSL is catching up to cable. As the totals indicate, this would be akin to congratulating a basketball team that losing by 20 points after the 1st quarter for only being down by 24 points at halftime.³⁸

Thus, despite increasing competition, the cable industry still maintains a commanding lead over the telephone industry in the broadband marketplace.

D. The Commission's Broadband Regulations Are Out of Step with Marketplace Realities.

The Commission has long recognized the critical need to ensure that its policies and rules keep pace with technological change and marketplace developments.³⁹ Yet, when it comes to

³⁵ *FCC December 2003 Broadband Data Report* at Table 4.

³⁶ SBC is now the largest ADSL provider and the second largest broadband provider in the U.S. *Leichtman Report* at 2.

³⁷ *Phone Companies Gain Ground in Speedy Web Access*, Reuters (May 4, 2004).

³⁸ *Leichtman Report* at 2 (quoting Bruce Leichtman).

³⁹ *See Authorization and Use of Software Defined Radios*, ET Docket No. 00-47, Notice of Proposed Rulemaking, 15 FCC Rcd 24,442 ¶20 (2000) ("In proposing new rules, we seek to ensure that our

broadband, the Commission's policies and rules are woefully out of step with marketplace realities. As discussed above, despite recent gains by DSL, cable companies still dominate their telephone company competitors in broadband subscribership. But, if one were to completely ignore the mounds of market data and focus solely on the Commission's policies and rules for regulating broadband, one would be forced to conclude that the Commission is laboring under the misimpression that telephone companies exercise near complete control over the broadband marketplace.

Indeed, while the cable industry is essentially unregulated in the provision of broadband, the telephone industry is subject to some of the most onerous regulations on the Commission's books -- regulations that were designed for a bygone era of monopoly telephone service, not today's competitive market for broadband service. ILECs who offer broadband service today, such as SBC, are subject to a plethora of regulations that impose a substantial burden on company resources, in terms of both time and expense, which could otherwise be devoted to the development of new and innovative broadband services. For example, unlike cable companies, ILECs that offer broadband are required to: unbundle their transmission facilities and make them available to competitors pursuant to the *Computer Inquiry* requirements;⁴⁰ provide collocation space to their competitors; resell their services to competitors; interconnect with their

regulatory requirements keep pace with technology development.”); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Report, 14 FCC Rcd 2398 (1999) (*First 706 Report*) (Separate Statement of Commissioner Michael K. Powell: “The greatest danger for regulators, however, is our inability to keep pace with the speed of developments and innovations that the new networks will unleash. We must recognize that these new technologies, combined with the pro-competitive provisions of the 1996 Act, are shattering the traditional telecommunications paradigm.”) (footnote omitted).

⁴⁰ See *Wireline Broadband NPRM* ¶¶ 33-42.

competitors; comply with pricing and non-discrimination standards; comply with regulatory accounting requirements; and contribute to universal service support mechanisms, among other things (e.g., SBC must provide advanced services through a separate affiliate so long as it wishes to avail itself of the Commission's forbearance from the tariffing requirements that would otherwise apply to those services).⁴¹ Yet, despite their dominant position in the broadband marketplace, cable companies are subject to none of these obligations.

The disparate regulatory treatment between DSL service and cable modem service is not merely fodder for an academic debate. It has real world consequences that severely slant the competitive playing field in cable's favor and directly undermine Congress's attempt to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans"⁴²

A case in point is universal service. Today, DSL service providers are required to contribute to the federal universal service fund, but cable modem service providers are not.⁴³ With the federal universal service contribution factor currently set at almost nine percent,⁴⁴ DSL providers like SBC's advanced services affiliate, Advanced Services Inc. (ASI), are obligated to pay an average of more than \$2.00 per line per month into the federal universal service fund. On

⁴¹ See *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Memorandum Opinion and Order, 17 FCC Rcd 27000 (2002).

⁴² See Joint Explanatory Statement of the Committee of the Conference, S. Rep. No. 230, 104th Congress, 2d Sess. 1, 113 (1996).

⁴³ *Wireline Broadband NPRM* ¶¶ 72-79.

⁴⁴ See *Proposed Second Quarter 2004 Universal Service Contribution Factor*, CC Docket No. 96-45, Public Notice, DA 04-621 (released March 5, 2004) (setting the contribution factor at 8.7 percent).

an aggregate annual basis, this amounted to approximately \$80 million in universal service contributions on DSL services by ASI in 2003. *We expect that amount to surpass \$100 million in 2004.*

Given the competitive nature of the broadband market, DSL providers like ASI cannot afford to “eat” their universal service contributions and have little choice but to pass those contribution expenses on to their wholesale customers, who in turn are often forced by competitive pressures to pass those charges on to their subscribers in the form of higher rates, or in some cases line items on consumer bills. This places DSL providers at a tremendous competitive disadvantage compared to cable modem service providers, who have no universal service contribution obligations whatsoever. Aside from the obvious financial burdens and disincentives to investment that this creates for DSL providers, it also places some retail DSL providers in the unenviable position of having to explain the universal service line item charge to their customers, many of whom are dismayed to learn that they are required to pay this charge when their neighbors subscribing to cable modem service are not.

Moreover, it is hard to fathom how the Commission’s one-sided approach to universal service contributions for broadband services is consistent with Congress’s mandate that such contributions be imposed “on an equitable and nondiscriminatory basis.”⁴⁵ It is entirely inequitable and highly discriminatory -- not to mention just plain unfair -- to treat DSL service and cable modem service differently for universal service contribution purposes when these two services are virtually identical in all relevant respects. Indeed, the Commission’s discriminatory

⁴⁵ See 47 U.S.C. § 254(d).

contribution regime for broadband providers is a textbook example of arbitrary and capricious decisionmaking and would be highly unlikely to survive judicial scrutiny if challenged in court.⁴⁶

The Commission should immediately end this competitive disparity by declaring that: (a) *both* DSL service providers and cable modem service providers must contribute to universal service; or (b) *neither* DSL service providers nor cable modem service providers must contribute to universal service. While SBC would prefer the former,⁴⁷ either outcome is preferable to the current situation where only DSL service providers contribute. And the Commission need not launch a brand new proceeding to resolve this matter. The question of universal service contributions, like so many other urgent broadband issues, has been raised in a notice of proposed rulemaking, has been put out for comment, has been the subject of a comprehensive record, and has been pending before the Commission for more than two years.⁴⁸ As discussed below, the only thing left for the Commission to do is act.

⁴⁶ See *Chadmore Communications, Inc. v. FCC*, 113 F.3d 235, 242 (D.C. Cir. 1997) (“We have long held that an agency must provide an adequate explanation before it treats similarly situated parties differently.”); *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351, 1365 (D.C. Cir. 1993) (“[W]e remind the Commission of the importance of treating similarly situated parties alike or providing an adequate justification for disparate treatment.”); *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965) (The Commission “must explain its reasons [for disparate treatment] and do more than enumerate factual differences, if any, . . . it must explain the relevance of those differences to the purposes of the Federal Communications Act.”).

⁴⁷ See Comments of SBC Communications in CC Docket No. 02-33, at 41-46 (May 3, 2002) (“The better approach, and the one that is more consistent with section 254 of the Act, is to require all providers of interstate telecommunications to contribute to the universal service fund.”).

⁴⁸ See *Wireline Broadband NPRM* ¶¶ 65-83.

E. The Commission Should Redouble Its Efforts to Finish Its Pending Broadband Proceedings As Quickly As Possible.

In the *Fourth 706 Inquiry*, the Commission seeks comment on what actions it can take to accelerate broadband deployment. The answer is straightforward: finish the pending broadband proceedings as fast as possible.

As discussed above, the deployment of broadband networks and services is a highly capital-intensive and time-consuming undertaking. In order for broadband providers to invest the billions of dollars required to build-out broadband networks, especially the next generation of fiber-based broadband networks, they need one thing above all else from regulators -- a fair and stable regulatory environment. Commissioner Martin aptly highlighted this critical need for stability when he said:

[The Commission] need[s] to focus not only on changing our regulations, but also on changing the regulatory environment. Regulatory uncertainty and delay function as entry barriers, limiting investment and impeding deployment of new services. We should work to be faster and more reliable in our decisionmaking and in our enforcement efforts. Prolonged proceedings, with shifting rules, ultimately serve no one's interests, regardless of the substantive outcome.⁴⁹

Chairman Powell also emphasized the urgency of providing much needed regulatory certainty to the broadband industry:

We must now clarify the regulatory classification and treatment of these new services, so companies -- incumbents and competitors alike -- know what to expect and can make prudent decisions to build and enter these new markets.

. . . .

This is *not* the time for timidity. The Commission for too long has cracked open the door, but frightened by the dark, slammed it shut again. The market is crying out for a new regulatory passageway, and consumers are frustrated as they continue their long wait for policymakers' rhetoric and hoopla to shift into tangible actions that bring into being this promising new chapter in the history of communications and information. The time now is for action.⁵⁰

⁴⁹ *Third 706 Report*, Separate Statement of Commissioner Kevin J. Martin at 2.

⁵⁰ *Wireline Broadband NPRM*, Separate Statement of Chairman Michael K. Powell at 2.

Consistent with these calls for action, the Commission issued its *Third 706 Report* in February 2002 and described itself as “actively engaged in removing barriers and encouraging investment in advanced telecommunications.”⁵¹ In that *Report*, the Commission identified three wireline proceedings that are central to its “effort to establish an appropriate regulatory framework to promote investment in infrastructure and increase access to advanced telecommunications services for all Americans:” (1) the *Wireline Broadband NPRM*; (2) the *Non-Dominance NPRM*; and (3) the *Triennial Review NPRM*.

More than two years later, however, as the *Fourth 706 Inquiry* gets underway, the Commission’s key wireline broadband proceedings are largely stalled, having raised a multitude of important questions but so far having provided only a precious few answers. Of the three proceedings mentioned above, the first two have seen no Commission action since they were first launched in late 2001 and early 2002, respectively. And while some significant progress has been made on the third proceeding, it is still subject to numerous unresolved petitions for reconsideration and potential further litigation in the courts. This can hardly be the result that Congress had in mind almost a decade ago when it empowered the Commission to “take immediate action” to promote broadband deployment.⁵² Indeed, as described below, the Commission’s track record in establishing a regulatory framework and bringing certainty to the broadband marketplace has unfortunately been less than optimal.

(1) *Wireline Broadband NPRM* (February 15, 2002). In this rulemaking, the Commission sought to address perhaps the most fundamental questions about broadband Internet access

⁵¹ *Third 706 Report* ¶ 6.

⁵² § 706(b) of the 1996 Act.

service delivered over wireline networks: whether these services are telecommunications services or information services under the Act. While the Commission tentatively concluded that wireline broadband Internet access service is an information service with a telecommunications component, the Commission failed to reach a final decision on this crucial issue and instead left the matter open for another day -- a day which has still not arrived.⁵³ The Commission also raised questions about, but did not decide, whether and how a multitude of regulations should be applied to wireline broadband Internet access service, including the *Computer Inquiry* unbundling requirements; obligations relating to national security, network reliability and consumer protection; and universal service contribution requirements, among others.⁵⁴ More than two years later, the Commission has still not provided the sorely needed answers to these fundamental questions about how wireline broadband Internet access (including DSL service) will be regulated.

While the Ninth Circuit's decision in the *Brand X* case⁵⁵ may briefly have given the Commission some pause in moving forward with its tentative conclusions in the *Wireline Broadband NPRM*, the fact remains that cable modem service continues to enjoy the status of a completely unregulated information service, while its chief competitor, DSL service, unfairly remains subject to burdensome and unnecessary common carrier regulations. Indeed, the cable

⁵³ *Wireline Broadband NPRM* ¶ 17.

⁵⁴ *Wireline Broadband NPRM* ¶¶ 30-83.

⁵⁵ *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

industry has vowed to appeal the *Brand X* decision to the Supreme Court,⁵⁶ and if the Court hears the case on the merits, a final decision may not be forthcoming until well into 2005.

In the meantime, there is no reason the Commission cannot move forward to level the competitive playing field between DSL service and cable modem service. In the *Cable Modem Declaratory Ruling*,⁵⁷ the Commission found cable modem service to be an information service with a telecommunications component, but noted that the courts may disagree and conclude that cable modem service fits within the statutory definition of a telecommunications service.⁵⁸ The Commission recognized, however, that notwithstanding a possible determination that cable modem service is a telecommunications service, the Commission could nonetheless exercise its statutory authority to forbear from any Title II regulation of cable modem service and, further, the Commission tentatively concluded that doing so would be appropriate.⁵⁹

The Commission should move forward with a similar “belt and suspenders” approach with regard to wireline broadband services (*i.e.*, declare DSL to be an information service with a telecommunications component *and* forbear from any Title II regulations and waive any *Computer Inquiry* requirements that might otherwise theoretically apply). Doing so would allow the Commission to put DSL service on an equal footing with cable modem service and end the

⁵⁶ See *NCTA Statement of Dan Brenner Regarding Ninth Circuit Granting Stay in “Brand X” Ruling*, Press Release (April 9, 2004) (“We will now turn our attention to developing our formal appeal to the U.S. Supreme Court and look forward to having this case decided on its merits.”).

⁵⁷ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) (*Cable Modem Declaratory Ruling*).

⁵⁸ *Cable Modem Declaratory Ruling* ¶¶ 94-95.

⁵⁹ *Cable Modem Declaratory Ruling* ¶ 95. The Commission also decided to waive any *Computer Inquiry* unbundling requirements that might apply to the transmission component of cable modem service. *Id.* ¶ 45.

anti-competitive and patently unfair regulatory disparity that presently exists between these two services.

(2) *Non-Dominance NPRM* (December 20, 2001). In this proceeding, the Commission raised questions about the appropriate regulatory treatment of ILEC-provided broadband telecommunications services. The Commission asked a variety of questions about the relevant product markets for these services and whether ILECs possess market power in any of those markets.⁶⁰ The Commission also asked whether it would be appropriate to classify ILECs as non-dominant with respect to any broadband telecommunications services or markets and, if not, whether the Commission should streamline or eliminate some forms of dominant carrier regulation, including rules related to price cap regulation, non-discrimination, tariffing, and separate affiliate requirements.⁶¹

The Commission further asked whether there were additional “steps we can take in the context of this proceeding to fulfill our Congressional mandate under section 706.”⁶² But while the Commission clearly recognized the importance of the *Non-Dominance Proceeding* to fulfilling its statutory duty to remove barriers to investment in broadband infrastructure, the Commission has let the proceeding lie dormant for more than two and a half years.

(3) *Triennial Review Order* (August 21, 2003). In the broadband portion of the *Triennial Review Order*, the Commission determined that CLECs are not impaired without unbundled access to ILECs’ next generation broadband networks, and that requiring unbundling in the

⁶⁰ *Non-Dominance NPRM* ¶¶ 17-32.

⁶¹ *Non-Dominance NPRM* ¶¶ 33-48.

⁶² *Non-Dominance NPRM* ¶ 40.

absence of impairment would pose a significant disincentive for both ILECs and CLECs to make the risky investments needed to build those broadband networks. The Commission specifically declined to require unbundling of new fiber-based loops, packet switching and the packetized transmission capabilities of hybrid loops.⁶³ On appeal to the D.C. Circuit, the court affirmed the Commission's decision and explicitly recognized that unbundling could "pose excessive impediments to infrastructure investment."⁶⁴

While the Commission should be commended for removing some significant barriers to broadband investment with the *Triennial Review Order*, the decision nonetheless left other barriers in place and raised additional questions about the scope of the broadband unbundling relief that the Commission actually granted. In particular, the Commission's new rules appear to require ILECs to continue unbundling newly deployed dark fiber, even though the Commission itself found that ILECs have no inherent or first-mover advantages in deploying new fiber facilities.⁶⁵ Some parties also may argue that the Commission's rules could be read to require an ILEC to deploy time division multiplexing (TDM) facilities on their next generation packet networks to accommodate CLEC unbundling requests, even where the fiber loops and packet equipment is brand new investment.⁶⁶ In addition, while the Commission declined to require unbundling of fiber-to-the-premises, its rules are unclear as to whether that unbundling relief applies to mixed use neighborhoods that encompass residences, apartment buildings and small

⁶³ *Triennial Review Order* ¶¶ 272, 288, 535.

⁶⁴ *United States Telecom Assoc. v. FCC*, 359 F. 3d 554, 580 (D.C. Cir. 2004).

⁶⁵ *Triennial Review Order* ¶ 275.

⁶⁶ See BellSouth Petition for Clarification and/or Partial Reconsideration, CC Docket No. 01-338, at 16-18.

businesses.⁶⁷ Individually and collectively, these unresolved issues create significant uncertainty for ILECs attempting to build-out next generation broadband networks. ILECs do not know whether they will have to make portions of those broadband networks available to competitors and, consequently, whether their business models will support the substantial investment required to build those networks.

Fortunately, however, all of these issues are already the subject of petitions for reconsideration that have been pending at the Commission since October 2003. Thus, rather than distracting itself with a dubious appeal of the narrowband portions of the *Triennial Review Order*, the Commission should comply with the mandate of section 706 and devote its resources to expeditiously resolving the petitions and providing the regulatory certainty required to further incent investment in broadband networks.

III. CONCLUSION

By leaving so many critical broadband issues unresolved, the Commission is unnecessarily prolonging regulatory uncertainty in the marketplace and disincenting broadband providers from making the massive investment required to build out the next generation of broadband networks across our nation. At the same time, other countries are racing ahead of the U.S. in per capita broadband connectivity. Indeed, a recent study shows that the U.S. has slipped to eleventh place in terms of national broadband subscribership.⁶⁸ The consequences of this decline could be serious for our economy, as well-paying, technology-related jobs migrate to

⁶⁷ See BellSouth Petition for Reconsideration, CC Docket No. 01-338, at 1-8 (Oct. 2, 2003); Response of Verizon to Petitions for Reconsideration, CC Docket No. 01-338 at 15-24 (Nov. 6, 2003).

⁶⁸ See *ITU Internet Reports: Birth of Broadband*, International Telecommunications Union, Executive Summary at 5 (Sept. 2003) (ranking the U.S. eleventh in broadband penetration per inhabitant among other nations). See also *ICCP Broadband Update*, DSTI/ICCP/RD(2003)2, Organization for Economic Cooperation and Development, at slide 8 (Oct. 2003), (ranking the U.S. tenth in per capita broadband penetration compared to other countries).

those nations that have better connected populations and more advanced broadband networks. Thus, as the Commission moves forward with its efforts to fulfill the mandate of section 706, SBC urges the Commission to create a stable regulatory environment for investment in the U.S. broadband marketplace by fully and finally resolving its pending broadband proceedings.

Respectfully Submitted,

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